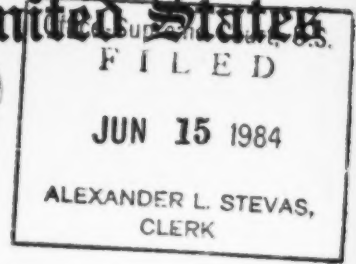


In The
Supreme Court Of The United States
OCTOBER TERM, 1983
83 - 2081 ①



LEIF R. SIGMOND, *Petitioner*

vs.

UNITED STATES OF AMERICA

**Petition Of Leif R. Sigmond For Writ Of
Certiorari To The United States Court
Of Appeals For The Third Circuit**

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QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court err in refusing to suppress all evidence illegally obtained by the State of New Jersey and subsequently turned over to the Federal Government?
2. Was the Petitioner denied his right to a fair trial as a result of the trial court's admission of evidence as to materials allegedly received by Scientific Chemical Processing, Inc. from generators without proof of the chemical composition of these specific materials?
3. Did the trial court err in refusing to compel discovery by the Government as to the volume and chemical composition of materials allegedly received by Scientific Chemical Processing, Inc. from generators?

4. Did the Petitioner suffer substantial prejudice from the variance between the offenses charged in the Indictment and the proof offered at trial?
5. Did the Court of Appeals err in refusing to order review of the sentence imposed upon the Petitioner on the grounds of disparity and discrimination in sentencing?
6. Did the Court of Appeals err in refusing to reverse the judgment of the trial court on the ground that the jury drew constitutionally impermissible inferences from the Petitioner's decision not to testify?
7. Was the Petitioner denied his Fifth and Sixth Amendment rights as a result of the trial court's failure to enforce a subpoena duces tecum which

was served on the Chief Counsel and Staff Director of the Subcommittee on Oversight and Investigation?

8. Was the Petitioner denied his right to a fair trial as a result of errors committed by the trial court with respect to supervision and instruction of the jury.

* The parties to the proceedings in the United States Court of Appeals for the Third Circuit were Leif R. Sigmond, Herbert G. Case, Jr., and Mack Barnes, appellants, and the United States of America, respondent.

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OPINIONS DELIVERED BELOW

No written opinion was rendered by the United States Court of Appeals for the Third Circuit, although a Judgment Order was entered. (App. A)

No written opinion was rendered by the United States District Court for the District of New Jersey with regard to the entry of the Judgment, Commitment and Order of Conviction (App. B). However, an unpublished written opinion dated November 16, 1982 was rendered by the District Court with regard to various pre-trial motions filed by the defense (App. C).

GROUND ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The Judgment Order of the United States Court of Appeals for the Third Circuit sought to be reviewed is dated April 16, 1984 (App. A). That Order affirmed without opinion the Judgment, Commitment and Order of Conviction of the

United States District Court for the District of New Jersey entered on May 25, 1983 (App. B).

Jurisdiction is conferred on this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND

STATUTES INVOLVED

The provisions of the United States Constitution and those statutes involved in this case are set forth in Appendix D.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On June 18, 1982, a Grand Jury for the District of New Jersey returned a 21-count Indictment charging Leif R. Sigmond (the Petitioner herein) Herbert G. Case, Jr., Mack Barnes, and Scientific Chemical Processing Company, Inc. ("Sigmond", "Case", "Barnes", and "SCP") with conspiracy to commit mail fraud and with substantive mail fraud charges.

On November 1, 1982, the defendants' pre-trial motions were heard before the Honorable Dickinson R. Debevoise. Defendants' motions for a bill of particulars, dismissal of the indictment, suppression of evidence, and severance were denied (App. C & E).

Trial commenced before Judge Debevoise on January 27, 1983 and, on March 10, 1983, following approximately six weeks of trial, Case was convicted on counts 1 through 4, 7 through 12, 15 through 17 and 19 through 21. Sigmond was convicted on counts 2 through 4, 7 through 12 and 15 through 17. Barnes was convicted on counts 1 through 4, 7 through 12, 15 through 17, 20 and 21. SCP was convicted on counts 1 through 4, 7 through 12, 15 through 17 and 19 through 21. (App. B).

Defendants' motions for a new trial were heard on May 4, 1983 and denied by Judge Debevoise.

On May 23, 1983, defendants appeared for sentencing. Sigmond was sentenced to thirty months imprisonment, \$10,000 in fines and five years probation. Case was sentenced to eighteen months imprisonment, \$2,000 in fines and five years probation. Barnes was sentenced to six months imprisonment, five years probation and \$500 in fines. (App. F). The evidence presented at trial clearly revealed that Sigmond was less culpable than his co-defendants. It appeared, however, that the trial court imposed a harsher sentence on Sigmond merely because of his position as president of SCP. (App. F) Racial factors were also relied upon by the trial court in imposing the sentences. (App. F).

On June 1, 1983, Sigmond filed a Notice of Appeal. By Judgment Order dated April 16, 1984, the Third Circuit Court of Appeals affirmed the judgment of the trial court. (App. A).

B. STATEMENT OF FACTS

The Indictment arose out of alleged activities of SCP, and Case, Barnes and Sigmond, as officers and employees, between June 1977 and October 1978. SCP was engaged in processing, recovery, and disposal of various industrial and chemical wastes generated by numerous industries. Some wastes were treated by SCP at its Newark and Carlstadt, New Jersey facilities and then returned to various generators or disposed of by SCP. Other wastes were converted into fuels and sold by SCP. All wastes were transported from the generator's location to either SCP's Newark or Carlstadt facilities. SCP also contracted with outside, independent haulers for transportation of wastes into and out of its facilities.

SCP operated pursuant to permits issued by the New Jersey Department of Environmental Protection ("NJDEP"). NJDEP

authorized SCP to transport wastes and to operate a facility for the treatment, processing and recovery of wastes.

SCP's Newark facility was located within the Passaic Valley Sewerage Commission ("PVSC") district and SCP was an authorized user of PVSC's combined sewerage system, designed for both industrial and domestic use. All sewerage wastes were channeled into an interceptor which flowed to the PVSC treatment plant located a few hundred feet from SCP's Newark facility. SCP's Newark facility was connected to the PVSC interceptor by a lateral sewer line. SCP's discharges mixed with the flow of the entire PVSC system and travelled the remaining distance to the treatment plant. After treatment, liquid residue from the treatment process was transported into a disbursement field in upper New York Bay while residual sludges were disposed of in the Atlantic Ocean.

The time period covered by the Indictment marks the beginning of an era of transition in the law and in attitudes as to the transportation, storage, treatment, and disposal of waste in the United States. It was on May 1, 1978 that NJDEP instituted a waste "manifest" system for reporting the receipt, transportation and disposal of certain chemical wastes. On May 9, 1978, SCP received a temporary operating authorization from NJDEP, for the operation of a special waste facility for transfer, storage, processing, reclamation, recovery, blending, and treatment of solid wastes.

Count One of the Indictment charged the defendants with conspiracy (18 U.S.C. §371) to violate the Mail Fraud statute (18 U.S.C. §1341) for the purpose of executing a fraudulent scheme and artifice regarding the treatment, recovery and disposal of industrial chemical waste in

New Jersey. Count One also alleged that defendants: (1) unlawfully discharged industrial chemical waste into the Hudson Bay through PVSC's sewerage treatment facility; (2) caused an independent hauler, Henry Heflich, and his companies to unlawfully transport and dump industrial chemical wastes at Lone Pine Landfill ("Lone Pine"), Freehold, New Jersey, from January through May 1978; (3) concealed unlawful dumping at Lone Pine by failing to issue Special Waste Manifests to NJDEP pursuant to the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq.; and (4) concealed the unlawful use of the PVSC system by submitting false and fraudulent Special Waste Manifests to NJDEP. The remaining twenty counts of the Indictment charged the defendants with substantive violations of Mail Fraud (18 U.S.C. §§1341 and 1342).

The Federal Indictment was the second indictment returned against Sigmond and the other defendants concerning the same activity. In 1979, a New Jersey State Grand Jury returned an indictment (No. 51-78-2) against SCP and Case, Barnes and Sigmond for illegally discharging chemical waste into PVSC's system between June 1977 and July 13, 1978. The State indictment against the defendants was ultimately dismissed in its entirety.

During the State investigation, evidence was seized from SCP'S Newark facility pursuant to search warrants issued by a State court judge. (App. N). Various corporate papers, records, samples of liquid waste, photographs and other items were taken. Defendants moved to suppress the evidence obtained on the grounds that (1) affidavits in support of the search warrants failed to establish probable cause to find illegal dumping and

(2) police misconduct by the affiants in that relevant information was withheld from the issuing judge. By Order dated April 3, 1981, the Honorable William H. Walls, J.S.C., granted the motion to suppress on the ground that the affidavits failed to establish probable cause as to any illegal activity without reaching the issue of the affiants' misconduct. (App. G).

The evidence suppressed in the State action was later turned over to the United States Attorney's Office for use in the present case. (App. I.) Judge Debevoise denied appellants' pretrial motions for suppression of evidence obtained under the defective State-issued warrants. (App. E).

In the federal action, the scheme and artifice charged in the Indictment upon which the mail fraud charges were based was the illegal disposal of chemical

waste. To defend against these charges, prior to trial the defendants moved for an order requiring the government to furnish information through a Bill of Particulars regarding the volume and chemical composition of the materials alleged to have been disposed of by SCP. (App. O). Judge Debevoise denied this request. (App. C & E). Throughout the course of the trial, the trial court improperly allowed evidence to be introduced as to materials allegedly received by SCP from generators without requiring proof by the government as to the chemical composition of the specific materials, as to whether or not the materials were hazardous, and, therefore, whether the method of ultimate disposal was illegal. (T. Vol. 1 p. 182 L. 14 to p. 186 L. 10; T. Vol. 1 p. 199 L. 1 to p. 200 L. 16; T. Vol. 1 p. 221 L. 10 to p. 223 L. 9; T. Vol. 2 p. 286 L. 5 to p. 289 L. 11; T. Vol. 2 p. 292 L. 16 to p.

293 L. 3; T. Vol. 5 p. 1137 L. 17 to p. 1140 L. 22.)

The Indictment in this matter charged the defendants with a single scheme to defraud regarding the transportation, treatment, recovery and disposal of industrial chemical wastes. At trial, however, the government offered proof of two separate schemes. One scheme alleged the disposal of hazardous wastes into the PVSC system and the second scheme alleged the disposal of hazardous wastes at the Lone Pine Landfill. No evidence was presented by the government at trial to implicate Sigmond in the alleged scheme to dispose of hazardous wastes at the Lone Pine Landfill.

During the federal trial Judge Debevoise quashed a subpoena which had been served on the Chief Counsel and Staff Director of the Subcommittee on Oversight and Investigation to the House Committee

on Energy, seeking certain documents.

(App. H). The original subpoena was narrowed during oral argument to cover reports of interviews of employees of Lone Pine Corporation and of employees of Henry Heflich with respect to the subject matter of the federal Indictment, who were, in the words of the Subcommittee, "knowledgeable." The Subcommittee had interviewed witnesses concerning activities at Lone Pine, the identities of the people or entities using Lone Pine, and the materials being disposed of there. These subpoenaed documents were relevant in that defendants may not have been identified as using Lone Pine in an illegal manner which would have been exculpatory. Judge Debevoise denied appellants' request to enforce the subpoena.

Finally, the trial court erred in instructions to the jury. First, a charge entitled "Absence of Witness", which drew

the jury's attention to appellants' decision not to testify, was given. (T. Vol. 26 p. 5065-5066). Secondly, a charge on defendants' Theory of the Case concerning the essential elements of the offenses charged was not given. Lastly, defendants' State of the Art charge with respect to developments and technological advances which occurred between the time period of the activities alleged in the Indictment and the time of trial was not given.

REASONS FOR ALLOWANCE OF THE WRIT

- I. ALL EVIDENCE ILLEGALLY OBTAINED BY THE STATE OF NEW JERSEY AND SUBSEQUENTLY TURNED OVER TO THE FEDERAL GOVERNMENT SHOULD HAVE BEEN SUPPRESSED BY THE TRIAL COURT.

The Fourth Amendment to the United States Constitution protects all persons against unreasonable searches and seizures, requiring searches and seizures to be made pursuant to warrants issued upon probable cause. U.S.C.A. Const.

Amend. 4. This Court has long held that a person's remedy for an unlawful search and seizure is to have the unlawfully obtained evidence, as well as the fruits of all such evidence, excluded from any criminal trial against him. Alderman v. United States, 394 U.S. 165, 171, reh. den. 394 U.S. 939 (1969). See also Rules 12 and 41 of the Federal Rules of Criminal Procedure.

This Court has firmly established that the exclusionary rule must be applied to prevent evidence obtained by state officers in an unreasonable search and seizure from being admitted against a defendant in a federal criminal trial. In Elkins v. United States, 364 U.S. 206 (1960), this Court ruled that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's constitutional rights, is inadmissible in

a federal criminal trial. 364 U.S. 223-224. Accord, Rios v. United States, 364 U.S. 253 (1960). See also United States v. Janis, 428 U.S. 433, reh. den. 429 U.S. 874 (1976).

The facts of the present case are on point with those of Elkins v. United States, supra. Evidence was seized from SCP's Newark facility by the State of New Jersey pursuant to three search warrants issued by the New Jersey courts in the course of the state investigation. The New Jersey courts, finding that the warrants were not based on probable cause, suppressed the use of all of the evidence. (App. G).

During the course of the state proceedings, the federal government obtained the seized materials from the State for use in these federal criminal proceedings. Although a grand jury subpoena was the vehicle used by the U.S.

Attorney for obtaining these materials, cooperation between state and federal officials clearly existed as evidenced by the testimony of New Jersey Deputy Attorney General, Gregory Sakowicz before the House of Representatives Subcommittee on Oversight and Investigations, Committee on Energy and Commerce (App. I). Mr. Sakowicz testified that the state investigation of Lone Pine began as a result of information obtained by the State during the course of the July 13, 1978 search of SCP's facility. (App.I at p. I-2 to I-6.) Mr. Sakowicz further testified that the State decided to close its criminal file on the matter due to available manpower resources and assign an investigator to work with the Office of the U.S. Attorney to develop a case. (App. I at p. I-22 to I-26.)

Prior to the trial in this matter, the defendants moved to suppress all of

ernment from the State of New Jersey as well as the fruits of that evidence, and for a hearing thereon. The trial court found that the rule in Elkins clearly prevented evidence obtained by state officers in an unreasonable search and seizure from being used in a federal criminal trial. (App. J p. 5 L. 13 to p. 5 L. 18). The court further found that as the defendants were directors, officers and owners of a closely held corporation, they had standing to challenge the searches of SCP's offices. (App. J p. 5 L. 24 to p. 6 L. 5). The court, however, denied the defendants' motion, finding that probable cause existed for the issuance of the warrants. (App. J p. 9 L. 1 to p. 9 L. 9). The court further found that even if the materials had been illegally seized by the state officers, they were unaffected by any taint as the federal government had obtained the

materials "through the lawful use of the Federal Grand Jury Process" (App. J p. 9 L. 10 to p. 9117). As set forth below, the trial court erred in denying this motion.

- A. AS THE SEARCH WARRANTS ISSUED BY THE NEW JERSEY COURTS WERE NOT BASED UPON PROBABLE CAUSE, THE SEARCHES AND SEIZURES WERE UNCONSTITUTIONAL.

The establishment of probable cause is the basis for determining the constitutionality of any search and seizure. USCA Const. Amend 4; see also Fed. R. Crim Pro. 41(c). The traditional standard used for determining probable cause is whether the evidence "would persuade a man of reasonable caution to believe that an offense was or is being committed and that evidence of assistance in securing an apprehension or conviction of the perpetrator likely would be found in the places to be searched." United States v. Nilsen, 482 F. Supp. 1335, 1338 (D.N.J. 1980), see

also Carroll v. United States, 267 U.S. 132 (1924). For purposes of a motion to suppress, the reviewing court can only consider the facts set forth in the affidavit furnished to support the application for the search warrant in deciding whether probable cause for the issuance of the warrant existed. Aguilar v. Texas, 378 U.S. 108, 109 n. 1 (1964).

In Spinelli v. United States, 393 U.S. 410, 414 (1969), this Court made it clear that probable cause cannot be based upon mere assertions of only innocent-seeming activity and data or upon unsupported statements of suspicion.

In the present case, the facts contained in the affidavits furnished in support of the search warrants (App. K, L & M) were insufficient to find probable cause of criminal activity. A reading of the affidavits reveals that the affiants made only eight observations as to the

activities at SCP's Newark facility as follows:

1. The sounds of gushing liquids through the manhole. (App. M)
2. Chemical odors from the manhole. (App K & M)
3. Tanker truck on SCP's premises. (App. K & L)
4. Hose from tanker truck to building. (App. L)
5. Gas mask on one worker on premises. (App. K).
6. Numerous 55 gallon drums on premises. (App. K).
7. Hose in building. (App. K)
8. Water running into sewer. (App. K).

Whether taken as a whole or looked at individually, the only conclusion that can be drawn from these eight observations is that the activities were innocent activities, consistent with a lawful chemical recovery business and did not give rise to probable cause of criminal activity.

Unquestionably, SCP was in the chemical

disposal and processing business at the time the warrants were issued. The State of New Jersey had issued permits to SCP to deal with chemicals. In fact, in his affidavit Richard Childs specifically refers to the operating authorizations that were issued by the NJDEP to SCP. (App. K.) These operating authorizations allowed SCP to transfer, store, reprocess, reclaim, recover, blend and treat chemical wastes. Each and every one of the observations made and contained in the affidavits were consistent with the lawful operation of a chemical treatment plant and did not indicate anything inconsistent with legitimate business activity.

As the New Jersey courts found, these affidavits failed to establish probable cause of criminal activity at SCP's Newark facility. The searches, therefore, were unconstitutional and the trial court should have granted the motion for sup-

pression or, at a minimum, ordered a hearing on the issue.

B. SUPPRESSION SHOULD HAVE BEEN GRANTED BECAUSE THE INFORMATION CONTAINED IN THE AFFIDAVITS WAS STALE.

A law enforcement officer's request for a search warrant implies by its very nature that the items sought are presently at the designated location. A finding of probable cause to search requires a determination that certain objects are probably connected with criminal activity and that those objects can currently be found at a particularly described place. In issuing the search warrant, the issuing judge must not only find that the information established probable cause, but he must also determine whether the information presented in the affidavit was current or whether it had grown stale. Sgro v. U.S., 287 U.S. 206 (1932). The likelihood that the evidence is no longer on the premises

increases with the passage of time between the gaining of facts constituting probable cause and the issuance of the warrant.

When a court finds that the information in the affidavit is not current, it must exclude the evidence seized pursuant to the search. Rugendorf v. U.S., 376 U.S. 528, reh. den. 337 U.S. 940 (1964); Berger v. U.S., 388 U.S. 41 (1967).

It is conceded that the question of staleness does not merely depend on the dates and times specified in the affidavits but will also depend on the nature of the unlawful activity that has been alleged. U.S. v. Harris, 482 F. 2d 1115 (3rd Cir. 1973). In U.S. v. Johnson, 461 F. 2d 285, 287 (10th Cir. 1972) the court noted that where the affidavit recites an isolated violation it can be implied that probable cause dwindles quickly with the passage of time but where the affidavit recites a continuous course

of conduct the passage of time is less significant.

In the present case, a reading of the three affidavits (App. K, L & M) furnished in connection with the search warrant issued on July 10, 1978 (App. N) indicates that no information contained in any of them was less than 18 days old when this warrant was issued. The affidavit of Russo (App. M) and the affidavit of Childs (App. L) refer solely to observations made on June 13th and June 14th, 1978, nearly one month before the search warrant was issued. The Affidavit of Smith (App. K) refers to observations made on June 22, 1978 and observations made between January and April 1978.

The affidavits submitted in the present case related to only several isolated incidents. No showing was made of any pattern which developed as a result of these isolated incidents. Both the affi-

davits of Childs (App. L) and Russo (App. M) relate to an incident taking no more than several minutes during their surveillance of June 13th and 14th, 1978. The affidavit of Smith (App. K) refers to observations made by him on June 22, 1978. These observations made on two occasions more than a week apart clearly did not establish any type of pattern or course of conduct by SCP. The affidavit of Smith also contained observations made between January 26, 1978 and April 26, 1978. However, these observations were well over two months old at the time of the issuance of the warrants.

In its opinion denying the motion to suppress, the trial court failed to address the issue of staleness. (App. J p. 5 L. 9 to p. 10 L. 12). Any information contained in the search warrant affidavits which might have given rise to probable cause was stale. The trial

court, therefore, should have held the issuance of the search warrants unconstitutional.

C. USE OF A GRAND JURY SUBPOENA DID NOT CURE THE TAIN OF THE ILLEGAL SEARCH AND SEIZURE BY THE STATE OFFICERS.

In his opinion, the trial judge found that even if the search warrant affidavits were not supported by probable cause, the silver platter doctrine proscribed by the Supreme Court in Elkins v. United States, supra, was not applicable as the materials had been obtained by the federal government by grand jury subpoena. (App. J p. 9 L. 10 to p. 9 L. 21). As set forth below, the use of a grand jury subpoena did not cure the taint of the illegal searches and seizures by the state officers and, therefore, the rule under Elkins should have been applied.

This Court has found that the use of a grand jury subpoena is not a seizure

within the meaning of the Fourth Amendment and, therefore, the exclusionary rule does not apply to grand jury proceedings.

United States v. Dionisio, 410 U.S. 1, 76 (1973); United States v. Calandra, 414 U.S. 338, 572 (1974). In United States v. Calandra, supra, the Court found that a suppression hearing would serve to delay and disrupt the grand jury in its investigative and accusatorial functions. The Court noted that the right to invoke the exclusionary rule is "reserved for the trial on the merits" and cannot be raised before the grand jury. 414 U.S. 349. Clearly, the mere fact that during the course of a grand jury proceeding a defendant cannot seek to suppress evidence obtained in violation of his Fourth Amendment rights, does not preclude him from later seeking to suppress that evidence at the time of trial.

In the present case, the use of the grand jury subpoena to obtain the materials seized by the State cannot be found to have prevented Sigmond from seeking to suppress those materials at the time of trial under the rule in Elkins, supra. Clearly, under United States v. Calandra, supra, Sigmond's right to move to suppress under the Fourth Amendment was reserved for trial and could not be invoked at the time the grand jury subpoena was served.

Additionally, in his opinion, the trial court noted that counsel for SCP had consented to the production of materials pursuant to the federal grand jury subpoena. (App. J p. 9 L. 21 to p. 10 L. 4) This consent, however, cannot be found to have affected Sigmond's Fourth Amendment right to move to suppress. The consent was given by counsel for the corporation. No attorney-client relationship

existed between the attorney and Sigmond. Therefore, there was no waiver of rights by Sigmond.

More importantly, the trial court ignores the fact that the materials illegally seized by state officers, and the fruits thereof, had been turned over by the state officers to the federal authorities prior to the issuance of the federal grand jury subpoena. Cooperation clearly preceded the issuance of the grand jury subpoena. (App. I.)

Cooperation between state and federal officials took place on April 19, 1981 (App. I at 125); the grand jury subpoena was issued on June 25, 1981 (App. S).

Therefore, the trial court should have granted the motion to suppress or, at a minimum, ordered an evidentiary hearing.

II. THE ADMISSION OF EVIDENCE AS TO MATERIALS ALLEGEDLY RECEIVED BY SCP FROM GENERATORS WITHOUT PROOF OF THE CHEMICAL COMPOSITION OF THE SPECIFIC MATERIALS CONSTITUTED

SUBSTANTIAL ERROR DENYING SIGMOND
HIS RIGHT TO A FAIR TRIAL.

This Court has held that a defendant is "entitled to be tried upon competent evidence, and only for the offense charged." Boyd v. United States, 142 U.S. 450 (1891). Where evidence has been improperly admitted, the test for ordering a new trial is not whether sufficient evidence upon which the defendant could be convicted was properly admitted, but rather whether any reasonable possibility existed that the evidence improperly admitted might have contributed to the conviction. Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963). Accord Luttrell v. United States, 320 F. 2d 462, 466-467 (5th Cir. 1963). See also United States v. Dixon, 658 F. 2d 181 (3rd Cir. 1981) where the district court had found that improper lines of questioning had warranted a new trial. In Chapman v. California, 386 U.S.

18, 23-24 reh. den. 386 U.S. 987 (1967), the Court found that the Fahy decision required the party claiming harmless error to prove the error to have been harmless beyond a reasonable doubt.

In the present case, review of the Indictment reveals that the alleged scheme and artifice upon which the mail fraud charges were based was the illegal disposal of chemical wastes. Throughout the course of the trial, the trial court improperly allowed evidence to be introduced as to materials allegedly received by SCP from generators without requiring proof by the government as to the chemical composition of the specific materials, as to whether or not the materials were hazardous, and, therefore, whether the method of ultimate disposal was illegal. The defense contended through its objections that as the defendants were charged with a mail fraud based upon the

illegal disposition of waste materials, it was necessary for the government to prove the chemical composition of the specific materials, thus establishing whether they were indeed hazardous and disposed of illegally. (T. Vol. 1 p. 182 L. 14 to p. 186 L. 10; T. Vol. 1 p. 199 L. 1 to p. 200 L. 16; T. Vol. 1 p. 221 L. 10 to p. 223 L. 9; T. Vol. 2 p. 286 L. 5 to p. 289 L. 11; T. Vol. 2 p. 292 L. 16 to p. 293 L. 3; T. Vol. 5 p. 1137 L. 17 to p. 1140 L. 22).

Sigmond suffered substantial prejudice by the improper admission of this evidence, denying him his right to a fair trial. As the entire case centered around the receipt and disposal of waste material found at a minimum, that this evidence might have contributed to the Sigmond's conviction. To insure Sigmond's his right to a fair trial, his conviction must be reversed and this matter remanded for a new trial.

In addition, the evidence admitted was insufficient to find that the defendants illegally disposed of the waste materials received by SCP from the generators.

The only evidence admitted as to the nature or quality of materials allegedly disposed of by SCP at the Lone Pine Landfill was the testimony of Carmine C. Trezza, a former employee of SCP. Mr. Trezza testified that SCP sent drums containing kolene to the Lone Pine Landfill. (T. Vol. 26 p. 5120 L. 24 to p. 5122 L. 17). No scientific analysis was presented by the government, however, to prove that these drums did in fact contain kolene.

No specific evidence was admitted as to the nature and quality of the materials allegedly disposed of by SCP into the PSVC system. Although evidence was presented by some generators as to what their waste

products consisted of generally, no evidence was presented as to the chemical composition of the specific materials allegedly received by SCP. In addition, no evidence was presented to prove that the materials received by SCP were identical to the materials disposed of by SCP. On the contrary, the testimony at trial established that all materials disposed of into the PVSC system were diluted with water. (T. Vol. 20 p. 4162 L. 16 to p. 4163 L. 8). No evidence was presented to prove that the materials allegedly disposed of into the PVSC system, when diluted with water, violated the PVSC regulations or were toxic.

A conviction under the mail fraud statute requires proof by the government of specific intent to defraud. See United States v. Pearlstein, 576 F.2d 531, 537 (3rd Cir. 1978); United States v. Klein, 515 F.2d 751, 754 (3rd Cir. 1975). With-

out proof of the chemical composition of the materials allegedly disposed of by SCP, the evidence was insufficient to show that the defendants intended to illegally dispose of the materials and thereby defraud the NJDEP, the PVSC and/or the generators as charged in the indictment. No scheme to defraud can be found if the materials were legally disposed of by SCP. As the government failed to prove the nature and quality of the materials allegedly disposed of by SCP, the evidence was insufficient to convict Sigmond and therefore, the conviction should be reversed and this matter remanded for a new trial.

III. THE TRIAL COURT ERRED IN REFUSING TO COMPEL DISCOVERY BY THE GOVERNMENT AS TO THE VOLUME AND CHEMICAL COMPOSITION OF MATERIALS ALLEGEDLY RECEIVED BY SCP FROM GENERATORS.

Under Rule 7(f) of the Federal Rules of Criminal Procedure, the courts have the

authority to direct the filing of a bill of particulars. Although the authority under the rule is discretionary, the courts have found that the 1966 amendment to Rule 7(f), which eliminated the previous requirement that a defendant show cause for obtaining a bill of particulars, was intended to encourage the courts to take a more liberal attitude towards the granting of bills of particulars. See United States v. Addonizio, 451 F.2d 49, 64 (3rd Cir. 1972), cert. den. 405 U.S. 936 (1972), reh. den. 405 U.S. 1048 (1972).

In the present case, prior to trial, the defendants moved for an order requiring the government to furnish a bill of particulars. (App. O). Bill of Particulars Numbers 2, 3, 5 and 6 sought information regarding the volume and chemical composition of the materials alleged to have been disposed of by SCP. In his

opinion filed on November 16, 1982, (App. C), Judge Debevoise denied this request, finding that the records made available by the government provided the defendants "with all that they need to prepare their defense in this regard." (App. C p. 5) The records made available by the government failed to inform the defendants of either the volume or chemical composition of the materials alleged to have been disposed of by SCP. As set forth in Part II above, the volume and nature of the materials allegedly disposed of were central to the charges. The failure to require discovery of these matters substantially prejudiced Sigmond in the preparation of his defense. The indictment was too vague and indefinite for Sigmond to prepare his defense and avoid surprise at trial. The trial court should have ordered the government to answer the bill of particulars.

IV. SIGMOND SUFFERED SUBSTANTIAL PREJUDICE FROM THE VARIANCE BETWEEN THE OFFENSES CHARGED IN THE INDICTMENT AND THE PROOF OFFERED AT TRIAL AND, THEREFORE, JUDGMENT OF ACQUITTAL SHOULD BE ENTERED.

In the prosecution of a mail fraud charge, the courts have found that it is error for the government to charge a single scheme and then offer evidence of two or more schemes at trial. United States v. Camiel, 689 F. 2d 31 (3rd Cir. 1982). In Camiel, supra at p. 35, the court found that the two-pronged test of Kotteakos v. United States, 328 U.S. 750 (1946) controlled to determine whether the variance in a particular case was sufficient to justify a reversal, i.e. (1) whether there was variance between the indictment and the proof and (2) whether the variance prejudiced some substantial right of the defendant.

In Camiel, supra, the court found that where multiple schemes were involved,

but the government failed to implicate all defendants in each scheme, substantial prejudice resulted to one defendant from the spillover effects caused by the introduction of evidence against another defendant. 689 F.2d 38. The court further found that the only appropriate remedy was the grant of a judgment of acquittal as the indictment itself was defective. 689 F.2d 39-40.

In the present case, the Indictment charged the defendants with a single scheme to defraud. At trial, however, the government offered proof of two separate schemes. One scheme alleged the disposal of hazardous wastes into the PVSC system and the second scheme alleged the disposal of hazardous wastes at Lone Pine.

No evidence was presented by the government which could be found to implicate Sigmond in the alleged scheme to dispose of hazardous wastes at Lone

Pine. Henry Heflich testified that he only discussed Lone Pine with Case and Barnes, (T. Vol. 5 p. 1034 L. 14 to p. 103 L. 20), and similarly that he discussed the manifests with only Case and Barnes, (T. Vol. 5 p. 1048 L. 3 to p. 1051 L. 18). Mr. Heflich testified that he was briefly introduced to Mr. Sigmond on one occasion at the Newark facility, (T. Vol. 5 p. 1039 L. 15 to p. 1040 L. 8), and that he, his attorney and his consultant had met with Mr. Sigmond and Mr. Case after SCP had stopped using Heflich's services to discuss SCP's payment of Heflich's bill. (T. Vol. 5 p. 1131 L. 4 to p. 1131 L. 12). George Borden testified that the only person he had met from SCP was Mr. Case. (T. Vol. 7 p. 1519 L. 11 to p. 1519 L. 14) Mr. Borden did not offer any testimony which could implicate Mr. Sigmond in the alleged scheme to dispose of hazardous wastes at Lone Pine. No

other evidence was offered by the government to implicate Mr. Sigmond in this alleged scheme.

The government's offer of proof as to two alleged schemes rather than one as charged in the Indictment constituted an impermissible variance. Although no evidence was presented by the government to implicate Sigmond in the alleged scheme to dispose of hazardous wastes at Lone Pine, Sigmond was convicted on counts which related solely to Lone Pine (i.e. Counts 8, 9 and 10). Sigmond, therefore, suffered substantial prejudice from the spillover effect of the evidence admitted as to the alleged Lone Pine scheme, and an acquittal should be granted.

V. THE COURT OF APPEALS ERRED IN REFUSING TO ORDER THE TRIAL COURT TO REVIEW THE SENTENCE IMPOSED ON SIGMOND.

Under Rule 35 of the Federal Rules of Criminal Procedure, a trial court can

reduce a sentence following a mandate by an appellate court that the sentence be reviewed. An appellate court may review a sentence for the presence of illegality or gross abuse of discretion, United States v. Yates, 553 F.2d 502 (5th Cir. 1977) or for a clear abuse of discretion. United States v. Biskoff, 531 F.2d 182 (3rd Cir. 1976); United States v. Ligari, 658 F.2d 130 (3rd Cir. 1981); United States v. Hopkins, 531 F. 2d 576 (D.C. Cir. 1976). See also United States v. Yates, 356 U.S. 363 (1958).

A. The Sentence Imposed On Sigmond Should Be Reviewed Due To Disparity In Sentencing.

Where facts point to the conclusion that the district court has arbitrarily singled out a minor defendant for a more severe sentence than that imposed on a codefendant, the appellate court will correct the disparity. See United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).

See also United States v. Robinson, 426 F. Supp. 266 (S.D.N.Y. 1976).

Disparity in sentencing existed in the present case. The evidence presented at trial clearly indicated that Sigmond was less culpable than his codefendants. The government presented less evidence to implicate Sigmond than it did as to Case and Barnes. This is clearly established from the fact that Sigmond was convicted on fewer counts than his codefendants. (App. P) Despite this fact, the sentence imposed on Sigmond (App. F p. 45 L. 25 to p. 46 L. 10) was one year higher than that imposed on Case (App. F p. 49 L. 8 to p. 49 L. 17) and two years higher than that imposed on Barnes (App. F p. 50 L. 8 to p. 51 L. 2).

The trial court appeared to base these disproportionate sentences, in part, upon the parties' positions in the corporation. (App. F p. 47 L. 14 to p.

47L16; p. 48 L. 25 to p. 49 L. 1; p. 50 L. 6 to p. 50 L. 7) It appears that Sigmond was given a harsher sentence merely because of his position as president of the corporation; all three defendants, however, were officers and owners of the corporation and all three were responsible for the corporation's actions. The mere fact of Sigmond's title in the corporation should not have been used to increase the sentence against him and, therefore, the sentence should be reviewed.

B. The Sentence Imposed On Sigmond Should Be Reviewed Due To Discrimination In Sentencing.

The federal courts have recognized that discrimination exists where a member of one race, (whether black or white) is subjected, because of his race, to a greater or different punishment than a member of another race. Maxwell v. Bishop, 398 F.2d 138, (8th Cir. 1968) judgment vacated on another ground, 398

U.S. 262 (1970). See also Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968) and United States v. York, 288 F. Supp. 955 (D. Conn. 1968).

At sentencing in the present case, the trial judge pointed out that codefendant Barnes was black and born in the south before civil rights activities had changed that part of our land (App. F p. 49 L. 18 to p. 49 L. 23) and sentenced Barnes to a prison term two years less than that imposed upon Sigmond. It is evident that racial factors contributed to the court imposing a sentence upon Barnes which was two years less than that imposed upon Sigmond. Id. This racial discrimination in sentencing was clearly improper and an abuse of the trial court's discretion and, therefore, the sentence imposed upon Sigmond should be reviewed.

VI. SIGMOND'S CONVICTION SHOULD BE
REVERSED AS THE JURY DREW
CONSTITUTIONALLY IMPERMISSIBLE

INFERENCES FROM THE DEFENDANTS'
DECISIONS NOT TO TESTIFY.

- A. Sigmond Was Denied His Fifth Amendment Right To Remain Silent As A Result Of References Made By The Government.

The Fifth Amendment affords each citizen the privilege of remaining silent without adverse inferences attaching. A defendant's election not to testify or explain evidence against him cannot be considered as tending to indicate the truth of the evidence nor may any inference be drawn therefrom by the jury or through the comments of the prosecutor or instructions of the court. Carter v. Kentucky, 450 U.S. 288, 305 (1981); Government of the Virgin Islands v. Bell, 392 F. 2d 207, 208 (3rd Cir. 1968). See also Griffin v. California, 380 U.S. 609, 615 (1965).

In the present case, Sigmond, Case and Barnes each exercised his right to remain silent and did not testify at

trial. In its rebuttal to defense summations, the government made references with respect to the defendants' elections not to testify or call witness. (App. Q) The defense objected to these references and moved for a mistrial, which motion was denied. (T. Vol. 26 p. 5034 L. 19 to p. 5035 L. 12, p. 5036 L. 6 to p. 5036 L. 22).

The government comment on the election of the defense not to call witnesses or testify violated Sigmond's Fifth Amendment rights.

B. Sigmond Was Denied His Fifth Amendment Right To Remain Silent As A Result Of The "Absence Of Witness" Charge Given By The Trial Court.

Following summation, the Government requested a charge concerning "Absence of Witnesses" (T. Vol. 26 p. 5040 L. 2 to p. 5040 L. 5). Defendants' objection to any such charge was rejected, (T. Vol. 26 p. 5040 L. 17 to p. 5041 L. 9), and the jury was instructed as follows:

If it is peculiarly within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case, failure to call that witness may give rise to an inference that his testimony would be unfavorable to that party. However, no such conclusion should be drawn by you with regard to a witness who was equally available to both parties, or where the witness' testimony would be merely cumulative. The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. (T. Vol. 26 p. 5065 L. 18 to p. 5066 L. 5) (Emphasis added).

The defense objected that the charge may have left an adverse inference in the minds of the jurors from the fact that the defendants themselves did not take the stand. (T. Vol. 26 p. 5114 L. 1 to p. 5115 L. 3).

In addition to reading the charge to the jury, the charge was typed up and provided to the jury during their deliberations, over the objection of

defense counsel. (T. Vol. 26 p. 5117 L. 15 to p. 5117 L. 16). The typed charge was headed "ABSENCE OF WITNESS". This heading was especially prejudicial because the court did not differentiate in the charge nor explain separately to the jury that a distinction should be made between a witness generally and defendants.

Even assuming the "ABSENCE OF WITNESS" charge was not inappropriate per se, the court had an affirmative duty under the circumstances to give a curative cautionary instruction whether requested by defendants or not to protect defendants' rights with regard to the privilege against self-incrimination. See Lakeside v. Oregon, 435 U.S. 333, 339-341 (1978). See also Carter v. Kentucky, supra at 450 U.S. 301 n. 17, where the Court noted that "more harm may flow from the lack of guidance to the jury . . . than from reasonable comment upon the exercise of the privilege."

The failure to give a curative instruction violated Sigmond's Fifth Amendment rights.

- C. The Jurors' Statements Recorded In The Walder Affidavit Clearly Demonstrate That The Jurors Improperly Considered The Defendants' Failure To Take The Stand Contrary To The Fifth Amendment.

Following the jury's verdict, while leaving the courthouse, Justin P. Walder, counsel for co-defendant Case, was approached by several jurors who commented on the defendants' failure to testify. A majority stated that they considered the failure of the defendants to testify in their deliberations and that it affected their verdict. (See Affidavit of Justin P. Walder set forth in App. S). The statements were made to Mr. Walder without solicitation and immediately following the trial and are within the hearsay exception for present sense impressions. Fed R. Evid. 803(1); see also Zenith Radio

Corporation v. Matsushita Electric

Industrial Company, 505 F.Supp. 1190, 1228
n. 48 (E.D.Pa. 1980).

Fed. R. Evid. 606(b) provides

". . . a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. . . ." This exception to the general rule that jurors cannot impeach their own verdict is necessary to redress violations of constitutional rights such as those at issue here. See United States ex rel Owen v. McMann, 435 F. 2d 813, 815 (2nd Cir. 1970), where the court found that consideration of facts outside the record by the jury held such probable prejudice to the defendant as to render the verdict inherently lacking in due process. See also United States v. Vento, 533 F. 2d 838, 389 (3rd Cir. 1976);

United States v. Bangariol, 665 F. 2d 877, 885 (9th Cir. 1981); United States v. Vasquez, 597 F. 2d 192, 193 (9th Cir. 1970); United States v. Renteria, 625 F. 2d 1279, 1284 (5th Cir. 1980). In Paterson v. Colorado, 205 U.S. 454, 462 (1907), Justice Holmes noted that a jury is to reach its verdict "only by evidence and argument in open court and not by any outside influence, whether of private talk or public print." (Emphasis supplied).

Since the jury is barred by the Fifth Amendment from considering the defendants' election not to take the stand, the defendants' decision was not evidence. Such consideration was consideration of extrinsic evidence. Sigmond submits that any inference drawn from not testifying would, in effect, be drawn from extrinsic evidence not properly before the jury. The jury improperly considered the defendants' election not to testify. (App.

R.) Sigmond was deprived of his constitutional rights to a fair trial and to remain silent as a result of the jurors' consideration of this extraneous, prejudicial information.

VII. SIGMOND WAS DENIED HIS FIFTH AND SIXTH AMENDMENT RIGHTS AS A RESULT OF THE TRIAL COURT'S FAILURE TO ENFORCE THE SUBPOENA DUCES TECUM SERVED ON THE CHIEF COUNSEL AND STAFF DIRECTOR OF THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATION.

Defendants served a subpoena on the Chief Counsel and Staff Director of the Subcommittee on Oversight and Investigation to the House Committee on Energy, seeking certain records (App. H). The original subpoena was narrowed to cover any interview reports of employees of Lone Pine Corporation, Henry Heflich or any drivers from Heflich's companies, and generators whose materials went to Lone Pine (T. Vol. 18 p. 3689 L. 13 to p. 3689 L. 17). The Subcommittee refused to

produce the records, relying on a qualified testimonial privilege.

The necessity and importance of the requested material was due to its relevance concerning the substance of the charges, as well as the credibility of government witnesses. The interview reports sought were those of persons identified by the Subcommittee as "knowledgeable". These documents were specifically relevant to whether or not the defendants had knowledge of wastes being taken to Lone Pine. Defendants could not demonstrate a more specific need because they were unaware of what specifics the documents would reveal. This is a common problem encountered in cases where the documents being sought are in the possession of another and have never been fully disclosed.

Additionally, the documents related to critical time periods. The Indictment

contended wastes were delivered after May 1, 1978 to Lone Pine from SCP without Special Waste Manifests. The only testimony on that point was from Heflich. No one from Lone Pine, including Borden, related anything to the time period of May 1 and after. Therefore, the statements of Lone Pine employees who worked during the same time period were material and relevant to the defense. This was especially true since the employees could not be interviewed as they were never identified.

The Speech and Debate privilege is essentially a qualified "testimonial privilege." In In Re Grand Jury Investigation, 587 F. 2d 589-597 (3d Cir. 1978), Judge Gibbons analyzed Art. I, Section 6.1, of the Constitution and stated that to the extent that the clause creates a testimonial privilege it does so only for the limited purpose of protecting legisla-

tors and the legislative process from harassment. It was not designed to encourage confidences by maintaining secrecy. In In Re Grand Jury, supra, the court reviewed a subpoena for production of telephone records of a congressman which were in the possession of the House of Representatives. The Court stated that the records were largely not testimonial in nature and had to be produced.

The qualified testimonial privilege relied upon by the Subcommittee pales when weighed against the constitutional rights of the defendants to compulsory process and due process of law. The within subpoena sought documents which were non-testimonial as to any member of Congress or any staff member. Rather, the subpoena sought interview reports of various employees of Lone Pine Corporation, Heflich or his employees and generators using Lone Pine who the Subcommittee identified as

"knowledgeable" concerning Lone Pine activities. Further, the Subcommittee had already issued its report, and therefore, the materials requested need not have been kept confidential as indictments had already been returned.

In United States v. Nixon, 418 U.S. 683 (1974), the United States Supreme Court examined the issuance of subpoenas duces tecum pursuant to Fed. R. Crim. P. 17. The Nixon subpoena was issued by a special prosecutor for documents and tape recordings in the possession of the President. In analyzing the subpoena power, the Court cited Bowman Dairy co. v. United States, 341 U.S. 214, 221 (1951), and again agreed that the subpoena power could be exercised pursuant to the Fifth and Sixth Amendments to produce "any document or other materials admissible as evidence" at trial. The Nixon Court recognized that an applicant for a subpoena need only show

relevancy, admissibility and specificity in obtaining documents from the subpoenaed party. Id. at 700. In the absence of military, diplomatic or sensitive national security secrets, such materials should at least be turned over to the court for in camera inspection. Id. at 706.

In the present case the defendants' rights to due process of law and to the production of exculpatory evidence and evidence affecting credibility of witnesses are involved here. The Subcommittee was instrumental in initiating the charges against the defendants and held in its possession interview reports which were not available through any other source. Under these circumstances, the materials must be viewed in the context of Brady v. Maryland, 373 U.S. 83 (1963) and United States v. McCrane, 547 F. 2d 204 (3d Cir. 1976).

For the reasons set forth above, the trial court erred in refusing to enforce the subpoena. To protect and assure Sigmond's Fifth and Sixth Amendment rights, the verdict of the trial court should be vacated.

VIII. THE TRIAL COURT COMMITTED VARIOUS ERRORS RESPECTING THE SUPERVISION AND INSTRUCTION OF THE JURY WHICH INDIVIDUALLY AND COLLECTIVELY DENIED SIGMOND A FAIR TRIAL.

A. The Trial Court Erred In Refusing To Charge The Jury On Defendants' Theory Of The Case.

The trial court refused to give the defendants' requested "Theory of the Case" charge.

Trial courts are bound to give the substance of a requested instruction relating to any defense theory for which there is any foundation in the evidence. United States v. Blair, 456 F. 2d 514, 520 (3d Cir. 1972), United States v. Lowell, 490 F. Supp. 897, 906 (D.N.J. 1980). In the

present case, the defendants' defense was that they had no knowledge that Heflich and/or his companies were using Lone Pine for the unlawful disposal of industrial wastes and they had no knowledge that the facilities of the PVSC were used for the unlawful disposal of industrial wastes. Consequently, they could not have been knowingly and willfully involved in any scheme or artifice to defraud.

The court's failure to give defendants' theory of the case charge constitutes error and mandates reversal.

Government of the Virgin Islands v. John,
447 F. 2d 69, 74 (3d Cir. 1971).

B. The Trial Court Erred In Refusing
To Charge the Jury On The State Of
The Art.

The trial court refused to give requested "State of the Art" charge. (T. Vol. 26 p. 5106 L. 25 to 5107L9). The refusal to charge was severely prejudicial to Sigmond and constituted plain error.

Fed. R. Crim. P. 52 (b). The failure to charge denied Sigmond his due process right to a fair trial.

The state of the art charge was requested to address the rapid technological advances and changes which occurred between the time period of acts alleged in the Indictment and the time of trial. The acts charged in the Indictment were alleged to have occurred between June 1977 and May 1978. The trial was held almost six years later in January and February 1983. The charge would have instructed the jury to consider the custom and practice in the industry at the time of the events in determining the innocence or culpability of an individual. An individual in the industry is to be held to the degree of skill and of knowledge of development in the art of the industry existing when the alleged acts occurred. Smith v. Minster Machine Co., 669 F. 2d

628, 632 (10th Cir. 1982).*

The justification for applying a state of the art defense in this case relates to the requirement of intent. when dealing with a crime such as mail fraud, mens rea is an essential element; there must be intent to defraud. The state of the art charge proposed by defendants covered the standards and regulations in effect at the time the offenses were allegedly committed; it was therefore relevant as to the individual's state of mind at the time. Sigmond had no knowledge that Lone Pine or PVSC was being used for the unlawful disposal of wastes. Consequently, Sigmond could not have been knowingly and willfully involved

* See also Feldman v. Lederle Laboratories, 189 N.J. Super 424, 432-433 (App. Div. 1983), where the state of the art defense was permitted in ordinary products liability cases. The rationale for such a defense in a criminal case would appear even stranger where the defendant faces not only a pecuniary sanction, but a loss of freedom.

in any scheme or artifice which employed the United States mails to defraud the NJDEP, PVSC or specific generators in any substantive act of mail fraud charged in the Indictment.

Under the state of the art charge, the jury could have evaluated intent in light of the knowledge, skills and regulations of the industry at the time of the offense. Failure to give this charge, ignored the mens rea requirement, of the offense.

The cumulative effect of these errors requires that the verdict be vacated and that the appellants be granted a new trial.

CONCLUSION

For the reasons set forth herein, it
is respectfully requested that the
Petition for Certiorari be granted.

Respectfully submitted,
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